

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA

TIMOTHY W. CLAY,	)	
	)	
Petitioner,	)	
vs.	)	Case Number CIV-08-68-C
	)	
THE STATE OF OKLAHOMA, et al.,	)	
	)	
Respondent.	)	

**MEMORANDUM OPINION AND ORDER**

This action for habeas corpus relief brought by a prisoner, proceeding pro se, was originally filed on January 17, 2008. Consistent with the provisions of 28 U.S.C. § 636(b)(1)(B), the case was referred to United States Magistrate Judge Gary M. Purcell. Judge Purcell entered a Supplemental Report and Recommendation (“R&R”) on May 14, 2008, recommending the Petition be dismissed as it contained exhausted and unexhausted claims. The Court adopted that R&R on June 5, 2008, and entered a Judgment of Dismissal Without Prejudice. On June 12, 2008, Petitioner filed a second 28 U.S.C. § 2254 Petition. Consistent with the previous Order, the newly filed Petition was referred to Judge Purcell. By R&R filed July 24, 2008, Judge Purcell noted that Petitioner still pursued unexhausted claims and again recommended dismissal without prejudice. Once again, the Court found Judge Purcell’s recommendation proper and dismissed Petitioner’s case without prejudice. Petitioner has now filed a Motion to Amend Petition for Writ of Habeas Corpus.

Review of the materials in this case reveals that Petitioner continues to press a mixed claim; that is, one containing both exhausted and unexhausted claims. Nothing in the present motion indicates that Petitioner has presented to the Oklahoma Court of Criminal Appeals

the unexhausted issues. Thus, were the Court to grant Petitioner's motion, his case would again be subject to dismissal as a mixed Petition. Because the amendment suggested by Petitioner would be futile, his request will be denied. See Anderson v. Suiters, 499 F.3d 1228, 1238 (10th Cir. 2007) ("A district court may refuse to allow amendment if it would be futile.") (citing Lind v. Aetna Health, Inc., 466 F.3d 1195, 1199 (10th Cir. 2006)).

For the reasons set forth herein, Petitioner's Motion to Amend Petition for Writ of Habeas Corpus (Dkt. No. 68) is DENIED.

IT IS SO ORDERED this 25th day of September, 2008.

  
ROBIN J. CAUTHRON  
United States District Judge